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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ZE'EV BAR-AV, PH.D., PETITIONER

v.

PSYCHOLOGY EXAMINING BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

RICHARD B. JACOBSON
Counsel of Record

Law Offices of
Richard B. Jacobson, Ltd.
Suite 802
No. 44, East Mifflin St.
Madison, Wisconsin 53703
608.204.5990

Attorneys for Petitioner

CURRY & TAYLOR ◊ WASH D.C. ◊ (202) 393-4141 ◊ USSCINFO.COM

QUESTIONS PRESENTED

Petitioner Ze'ev Bar-Av ('Bar-Av'), then a licensed psychologist, was the subject of a complaint to the Psychology Examining Board ('Board') of the State of Wisconsin, investigated and prosecuted by the Division of Enforcement of the State's Department of Regulation and Licensing as Complainant. Ultimately the complaint led to a hearing before an Administrative Law Judge, at which the Complainant's outside expert was the same psychologist who chaired the Board at the time the complaint against Bar-Av was first filed, and had played a role in the consideration of earlier discipline. Prior to the hearing, Bar-Av and counsel for the Wisconsin Department of Regulation and Licensing's Division of Enforcement agreed that a certain psychological evaluation of Bar-Av was not to be admitted at the hearing, except to help determine appropriate discipline, should the Board decide to impose discipline. App. at 55a-57a. Notwithstanding this agreement, the psychological evaluation was given to the outside expert, who used it in reaching his (adverse)conclusions. App. at 24a-25a. The Board revoked Bar-Av's professional license. He sought review in the Wisconsin trial court, which affirmed the Board's decision. He then appealed to the Wisconsin Court of Appeals, which affirmed the trial court in *Bar-Av v. Psychology Examining Board*, 2007 WI App 21. Bar-Av sought review by the Wisconsin Supreme Court, which denied review. Thus the questions presented are:

1. Does a State professional regulatory board deny a licensed professional procedural Due Process when it admits the expert opinion of a (former) Board member who had chaired the Board at the

inception of the complaint against that professional?

2. Does a State professional regulatory board deny a licensed professional Due Process when it permits its expert witness to base his adverse conclusions largely on a document which all parties had agreed would not be admitted into evidence for such a purpose?

3. Does a State professional regulatory board deny a licensed professional Due Process when it interprets its regulations contrary to the plain statement of the statute which creates it and the regulations it is charged with implementing?

4. Does a state statute requiring a reviewing court to sustain an agency's action if supported by substantial evidence conflict with the agency's own rule of 'preponderance of the evidence' such that sustaining the revocation of a professional licence by a reviewing court is a denial of Due Process?

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PETITION FOR WRIT OF CERTIORARI

Ze'ev Bar-Av, Ph.D., respectfully petitions the Court to issue a Writ of Certiorari to review the judgment of the Wisconsin Court of Appeals issued 25 January 2007, which held that Bar-Av was not denied Due Process by the Psychology Examining Board of the State of Wisconsin in the revocation of his license to practice as a psychologist. The Court is faced with a decision which permits almost any governmental licensing authority to act with unreviewable caprice in procedures which can, and did, lead to the presumably permanent loss of a valuable interest, one's profession, whether conceived as a property or a liberty interest.

OPINIONS BELOW

The decision of the Psychology Examining Board, incorporating the opinion of the Administrative Law Judge who conducted the dispositive hearing, was issued 18 November 2006. It is not published, and appears in the Appendix hereto at pp. 33a to 54a. Pursuant to the Wisconsin Administrative Code (Ch. 227,52 Wis. Stats.), Bar-Av sought review at the State trial court (the Circuit Court for Dane County) on 26 November 2003. The circuit court sustained the Board's decision by Order entered 19 September 2004. Bar-Av appealed to the Wisconsin Court of Appeals on 10 December 2004 and that court affirmed in a decision published at 2007 WI App. 21 (2007).

JURISDICTION

The decision of the Wisconsin Court of Appeals was entered 25 January 2007. Bar-Av filed a Petition for

Review by the Wisconsin Supreme Court, which denied review by Order dated 19 April 2007. On 10 July 2007 Bar-Av moved this Court for an extension of time to file the present Petition to 30 August 2007, and subsequently moved for an extension to 6 September 2007, both of which were granted. The present Petition is timely.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

RELEVANT PROVISIONS INVOLVED

(a) The Due Process clauses of the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States, which provide, 'No person shall...be deprived of life, liberty of property, without Due Process of law....' (Article V), and 'nor shall any State deprive any person of life, liberty, or property, without Due Process of law' (Article XIV).

(b) Sec. 455.08, Wis. Stats., which directs the Psychology Examining Board to 'by rule, establish a reasonable code of ethics governing the professional conduct of psychologists, using as its model the "Ethical Standards of Psychologists", established by the American Psychological Association. The primary intent of this code shall be to assure that licensed psychologists limit their practice to those specialties in the field of psychology which they are qualified to practice.'

(c) Wisconsin Administrative Code ch. Psy. 5, esp. §5.01, which relates to Professional Conduct [of licensed psychologists]. This section identifies and prohibits unprofessional conduct, including '(2) Gross negligence in the practice of psychology....(4) Performance of professional services inconsistent

with training, education or experience....(14) Engaging in sexual contact [or seductive behavior]' with (a) a client [or] (b) A former client within two years of termination of professional services, or (c) A former client beyond two years of termination of professional services, unless the licensee can demonstrate that there has been no exploitation of the former client, in light of all relevant factors, including: 1. The length of time which has passed between the termination of professional services and the conduct. 2. The nature and duration of the professional services. 3. The circumstances of termination. 4. The client's personal history. 5. The client's mental status at the time the conduct took place. 6. The likelihood of adverse impact on the client or others. 7. [Seductive actions taken during the course of professional services.]' In addition, subsec. (17) lists as unprofessional conduct 'Failure to avoid dual relationships or relationship that may impair one's objectivity or create a conflict of interest. Dual relationships include treating employes, supervisees, close friends or relatives.'

(d) Sections 227.57(6) and (8) , Wis. Stats. provides that the court reviewing an administrative agency's decision shall take remedial action 'if it finds that the agency's determination depends on any finding of fact that is not supported by substantial evidence in the record.' And the reivewing court shall reverse or remand if it finds an abuse of discretion, inconsistent with a rule, or otherwise in violation of a statute or constitutional provision.

(e) Section 440.20 (3), Wis. Stats. sets the burden of proof in disciplinary proceedings in such entities

as the Board as preponderance of the evidence.

STATEMENT

Petitioner was a psychologist licensed to practice in the State of Wisconsin since 1978. During the early nineties he treated a couple identified in most of the record as Mr. A and Ms. B, who were then husband and wife. He conducted both individual and joint sessions. Mr. A had a history of some degree of sexual dysfunction and insecurity, and was alleged to have physically abused Ms. B. By the end of 1995 Dr. Bar-Av's treatment of both clients was terminated. In 1996 Dr. Bar-Av and Ms. B. developed a non-intimate friendly relationship whose first instance was a meeting requested by Ms. B. to discuss finding her a support group for individuals going through a divorce. In succeeding months she helped transport Dr. Bar-Av for about ten weeks when a seizure led to the temporary loss of his driving privilege; she provided him with a car, she lent or gave him several thousand dollars. (Although not apparently in evidence as such, the record certified to the trial court for its review includes communications from Bar-Av to the ALJ pointing out that there was a history of mutual payments of funds between himself and Ms. B. an effort to start a joint business venture.) Sometime at least 28 months after the final provision of therapeutic services, Dr. Bar-Av and Ms. B. began a sexual relationship, which continued at least through the time of the Board's hearing.

When Mr. A resumed treatment with a different psychologist in 1999, one of her principal tasks as detailed in her records, was to encourage and assist Mr. A. in bringing a complaint against Dr. Bar-Av before the Board. (The Board is part of the umbrella Wisconsin Department of Regulation and Licensing.) Mr. A. filed

his grievance on a complaint form provided by the Department of Regulation and Licensing's Division of Enforcement on 13 April 1999. The Division of Enforcement apparently took some time in carrying out its investigation, and ultimately filed a formal complaint against Dr. Bar-Av with the Board on 23 March 2003. After various communications and pre-hearing conferences, Administrative Law Judge Jacquelynn Rothstein held a lengthy hearing between 28 July and 1 August 2003.

The ALJ's decision was that Bar-Av had violated the provisions of Wis. Adm. Code §Psy 5.01 identified above, and she recommended suspension, further psychological evaluation to determine what education or supervision he might need, and imposition of the costs of the proceeding. After a period of comment and objections from both parties, the Board issued its final decision, adopting the ALJ's Findings of Fact and Conclusions of Law, and concluded that by engaging in a sexual relationship with Ms. B (even after the passage of more than two years), which he knew or should have known would have a harmful effect on Mr A., Bar-Av had violated §Psy 5.01(2) and (4), and further that by entering into a personal and sexual relationship with Ms. B, he violated subsections (14) and (17) of the same section. The Board then revoked Dr. Bar-Av's license and ordered him to pay the costs of the proceeding.

Bar-Av raised his allegations about denial of Due Process as to Seaman's being allowed toe testify at all in light of his conflicts of interest, and his use of the Gonsiorek report, and the lack of evidence showing demonstrable harm to Ms. B, in his brief in support of his petition for review of the Board's decison before the Dane County Circuit Court submitted 31 March 2004. These allegations were overruled. These issues were again

raised in Bar-Av's principal brief on his Appeal to the Wisconsin Court of Appeals, along with the question of the arbitrariness of denying Bar-Av, appearing *pro se* at the hearing, the opportunity to cross-examine Dr. Seaman on his compliance with applicable rules governing 'forensic' evaluations and its arbitrary holding that Seaman's evaluation was not 'forensic. The Court of Appeals disagreed. Finally, Bar-Av raised these denials of Due Process, including the question of the propriety of the Board acting *ultra vires* in stretching its interpretation of the statute and rules beyond good sense, and the denial of a fair hearing implicit in Bar-Av's being denied his full right of relevant cross-examination in his Petition for Review to the Wisconsin Supreme, which denied review. 2007 WI 61 (2007)

REASONS FOR GRANTING THE PETITION

A. State Courts and Agencies are Likely to Encounter The Issues Raised Here Frequently, and the Denials of Due Process Will Continue Because of a Fundamental Contradiction

It is a commonplace that both State and federal courts reviewing Administrative Agency decisions most frequently sustain the decisions. This is presumably the intention of such Administrative Procedure codifications as Chapter 227 of the Wisconsin Statutes, the federal Administrative Procedure Act [Title 5 U.S.C., esp. §706 (2)(F)] and equivalent statutes throughout the country. For example, a reviewing court in Wisconsin must sustain agency action unless essential findings of fact are not supported by 'substantial' evidence (or unless some statute or constitutional provision is clearly violated by

the decision). The deference relates only to facts, however, the weight of which the court may not question. Questions of law are apparently subject to *de novo* review. *Id.* The agency itself must find disciplinary action justified by the preponderance of the evidence. Sec. 440.20, Wis. Stats.

No doubt in the majority of instances, good public policy of economy in decision-making justifies the almost universal deference to agency decisions in many administrative matters. However, it is also well understood that the extent of Due Process protections afforded the affected individual must be based upon the circumstances, in particular the importance of the gains or losses involved. The process 'due' a defendant on a murder charge is far more extensive than that required upon an accusation of spitting on the sidewalk. *See, e.g. Cooper v. Salazar,* 196 F.3d 809, 813-814 (7th Cir. 1999); *Edward B. v. Paul,* 814 F.2d 52, 52-53 (1st Cir. 1987). Due Process requirements apply to administrative agencies no less than to courts. *Valley v. Rapides Parish School Bd.,* 118 F.3d 1047, 1052-1053 (5th Cir. 1997); *Harline v. Drug Enforcement Admin.,* 148 F.3d 1199, 1202-1205 (10th Cir. 1998).

However, the deference to administrative agency action even in cases where the deprivation of such an important liberty (and property) interest as the practice of a profession for which has qualified, is subject to a contradiction which itself involves a serious undermining of Due Process protections. The agency typically (as in Wisconsin, §440.20 Wis. Stats.) requires the preponderance of evidence standard of proof. But the reviewing (and deferring) court typically applies a 'substantial evidence' (*i.e.* only minimal credible evidence supporting a not irrational decision) test. Thus, the professional deprived of so strong a property interest as

his right to practice his or her profession, cannot under Administrative Procedure Acts effectively hold the State agency to its own standards. The reviewing court sustains administrative deprivations of the greatest economic weight on the lowest standard of proof. Due Process in such cases is strangled at the beginning of the process of review. And even as to matters of law, courts typically apply a 'controlling deference' as to the agency's construction of its own rules. *Hillhaven Corp. v. Wis. Dept. of Health and Family Services*, 232 Wis. 2d 400, 408, 606 N.W.2d 572 (Ct. App. 1999). However, in a case of first impression–like Bar-Av's–such deference should not be applied. *Id.* Indeed, so far as is known, the Board's action in the present case is virtually unique in seeking to punish Bar-Av for actions taken not, as the rules and statute appear to say, in the practice of psychology, but in his personal life more than two years after termination of therapy. And of course there was no evidence presented that there was any defect whatever in Bar-Av's professional treatment either of Mr. A. or Ms. B., and Ms. B denied being exploited in any way–the key element in the limited prohibition on post-treatment sexual relations.

B. The Agency's Misconstruction of its Rules and Enabling Statute Violates Due Process by Leaving the Regulated Professional Uncertain as to What is Prohibited.

Sec. 455.08, Wis. Stats. authorizes the Board to promulgate and enforce a code of ethics. It further directs the Board that '[t]he primary intent of this code shall be to assure that licensed psychologists limit their practices to those specialties in the field of psychology which they are qualified to practice.' *Id.* The code of ethics in question appears in Wis. Adm. Code §Psy 5.01,

which,*inter alia*, prohibits as unprofessional conduct '[p]erformance of professional services inconsistent with training, education, or experience.' *Id.*at (4).

The Wisconsin Court of Appeals, however, in reviewing the Board's application of this rule, approves its clear misreading of the intent of the rule (which obviously must be read with an eye to its enabling statute, which is also, of course, *in pari materia* with the administrative rule). 2007 Wis. App. ¶¶16 *et seq.* The statute tells us that the 'primary intent' of the code must be seeing that psychologists do not practice in areas for which they are not qualified. The Board, as approved by the Court of Appeals, reads the statute to prohibit errors *within* the psychologists training and experience as to which he or she should have known better (!) Thus, 'psychologists are trained and educated to maintain boundaries between themselves and their patients,' *Id.* at ¶16, quoting the Board with approval. In effect, therefore, any mere negligence becomes unprofessional, rather than the 'gross negligence *in the practice of psychology*' denounced by §Psy 5.01(2). (emphasis supplied) This is accomplished by an apparently willful misreading of the intent of the law and the language of the Administrative Code subsection at issue. The result is an entirely impermissible overbreadth as to what is prohibited–since anything the Board deems negligent behavior, even within the boundaries of the psychologist's area of expertise, is 'unprofessional' and subject to discipline under this subsection. This is impermissible, and clearly violates the licensee's Due Process right of adequate notice of the charges against him, and of his fundamental right to be informed what is permitted and what is not. *Fuji Photo Film Co., Ltd. v. International Trade Commission*, 474 F.3d 1281, 1292 (Fed. Cir. 2007). When a regulation is not sufficiently clear to warn a party

of what it is expected of him, the agency may not impose liability. *General Electric Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1328-1329 (D.C. Cir. 1995)

It is no less overbroad for the Board to base its discipline of Bar-Av on the possible effect his relationship with Ms. B would have on his former client Mr. A. The unequivocal intent of §Psy 5.01(14) is preventing exploitation of a client. The possible harm a much later sexual relationship with one former client might have on another former client is not mentioned, and is not prohibited. The Board's reading prevents the licensee from understanding what is prohibited and what is not. (This is no less true on the question of dual relationships–which are not generally prohibited unless they occur while professional services are being delivered. Otherwise, a licensee might enter into a business deal with, or purchase a home from, a former client years after the termination of the therapy, and find him or herself guilty of a breach of professional ethics.)

C. The Consideration of Adverse Evidence Contrary to Agreement Violates The Due Process Right to a Fair Hearing

Before the hearing, and apparently even before the creation of the 'Gonsiorek Evaluation,' Bar-Av, his attorney, and counsel for the Complainant Division of Enforcement entered into an agreement sharply limiting the use of the evaluation. Appx. at 55a-57a. They provided that if the dispute went to a hearing, the Complainant would not introduce as evidence at the hearing any information it obtained from the Evaluator for the purpose of proving that Bar-Av violated a statute or rule. *Id.* at ¶8. The evaluation could be used for the limited purpose of impeaching Bar-Av, rebutting any

evaluations Bar-Av might introduce, and for the purpose of determining what appropriate discipline or other action the Board should take. d. at ¶9. Otherwise, the evaluation must remain confidential. *Id.* at ¶10.

Despite this agreement, the Complainant sent the evaluation, written by a Dr. Gonsiorek, to Complainant's 'outside' expert, Dr. Seaman, who specifically testified that he read and used it in reaching his (highly adverse) conclusions. Hrg. t/s. at 288 *et seq.*

Read as a rational document, the Agreement makes apparent that the parties agreed not to *use* the Gonsiorek report as part of the determination of liability *vel non* of Dr. Bar-Av. The Complainant twisted the matter by providing the report to Dr. Seaman. The Wisconsin Court of Appeals determined that '[n]othing in the agreement prohibits Seaman from considering Gonsiorek's evaluation in formulating an opinion whether or not Bar-Av's conduct was unprofessional.' Appx. _ at ¶44. Apart from deferring to the Complainant on this question, the Court was disingenuous in noting that Seaman testified that the report did not affect his judgment, and told him nothing new. The persuasive effect of the report on Seaman was not a question which Bar-Av could have explored on cross-examination, because he insisted and insists on the enforcement of the Agreement, and of course he would not want the adverse report to become part of the record against him–exactly as the parties had earlier agreed. The likelihood of frequent repetition of such violations of rules and agreements, acceded to by Administrative Law Judges and the Courts, in light of the deference given to the agencies being reviewed, creates the risk of future denials of fair hearings to any licensed professional or credential-holder.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

Richard B. Jacobson
Counsel of Record
LAW OFFICES OF RICHARD B. JACOBSON, Ltd.
Suite 802
No. 44, East Mifflin St.
Madison WI 53703
608.204.5990

(any footnotes trail end of each document)
2004AP3251

SUPREME COURT OF WISCONSIN

Bar-Av v. Psychology Examining Board

April 17, 2007, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

OPINION

Petition for review denied.

Appeal No. 2004AP3251

COURT OF APPEALS OF WISCONSIN

ZE'EV BAR-AV, PH.D.,

PETITIONER-APPELLANT,

v.

PSYCHOLOGY EXAMINING BOARD,

RESPONDENT-RESPONDENT.

January 25, 2007, Decided

January 25, 2007, Filed

COUNSEL: On behalf of the petitioner-appellant, the cause was submitted on the briefs of George B. Strother and Kristin J. Sederholm of Krekeler Strother, S.C., Madison.

On behalf of the respondent-respondent, the cause was submitted on the brief of Thomas J. Balistreri, assistant attorney general, and Peggy A. Lautenschlager, attorney general.

JUDGES: Before Lundsten, P.J., Deininger and Higginbotham, JJ.

OPINION BY: HIGGINBOTHAM

OPINION

HIGGINBOTHAM, J. Dr. Ze'ev Bar-Av appeals an order of the circuit court affirming an administrative decision of the Psychology Examining Board (the Board) revoking his license to practice psychology, based upon findings of professional misconduct. Bar-Av argues that the Board's interpretation of its rules of professional conduct, in particular WIS. ADMIN. CODE § PSY 5.01(2), (4), (14) and (17),[1] is contrary to their plain language, and therefore is plainly erroneous. Bar-Av also argues that the Board's findings of fact and conclusions of law are not supported by substantial evidence. Finally, Bar-Av argues that various procedural errors in the administrative hearing deprived him of a fair hearing and violated his due process rights.

We conclude, applying the controlling weight standard, that the Board's interpretation of the rules at issue here is reasonable and consistent with their purpose. We also conclude that the Board's findings of fact and conclusions of law are supported by substantial evidence. Finally, we conclude that Bar-Av received a fair hearing and that his due process rights were not violated. We therefore affirm the circuit court's order affirming the Board's decision revoking Bar-Av's license to practice psychology in Wisconsin.

BACKGROUND[2]

On March 24, 2003, the Wisconsin Department of Regulation and Licensing, Division of Enforcement (DOE), filed a complaint against Bar-Av, a psychologist licensed to practice psychology in Wisconsin, alleging various charges of professional misconduct. These charges stem from the undisputed fact that Bar-Av

entered into a personal and sexual relationship with Ms. B, a former patient. Bar-Av provided joint and individual therapeutic services to Ms. B and her husband Mr. A. The DOE charged Bar-Av with (1) practicing psychology in a less than minimally competent manner and engaging in unprofessional conduct in general violation of WIS. ADMIN. CODE § PSY 5.01; (2) performing professional services inconsistent with training, education and experience and engaging in unprofessional conduct, in violation of § PSY 5.01(4); (3) acting with indifference to, or disregard of, the harmful impact his behavior would have on Mr. A constituting gross negligence and unprofessional conduct, in violation of § PSY 5.01(2); (4) engaging in sexual contact, conduct or any other behavior that could reasonably be construed as seductive with Ms. B without being able to demonstrate lack of exploitation in light of all relevant factors, in violation of § PSY 5.01(14); and (5) failing to avoid dual relationships that could impair his objectivity or create a conflict of interest, in violation of § PSY 5.01(17).

After a contested five-day evidentiary hearing, the administrative law judge (ALJ) concluded that Bar-Av engaged in unprofessional conduct as defined by WIS. ADMIN. CODE § PSY 5.01(2), (4), (14), and (17). Based on the ALJ's proposed decision, and after considering the parties' objections to the proposed decision and the entire record, the Board adopted the ALJ's proposed findings and conclusions.[3] The only variance between the Board's decision and the ALJ's proposed decision related to the discipline imposed on Bar-Av. Rather than suspend Bar-Av's license, the Board revoked Bar-Av's license to practice psychology in Wisconsin and ordered Bar-Av to pay costs incurred in this case. Bar-

Av sought judicial review of the Board's decision, pursuant to WIS. STAT. ch. 227. The circuit court affirmed the Board's decision. Bar-Av appeals.

STANDARD OF REVIEW

This appeal is taken from a circuit court decision affirming an administrative agency's decision. The scope of our review is the same as the circuit court's. *Target Stores v. LIRC*, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998). We review the Board's decision, not the circuit court's. *Stein v. Wisconsin Psychology Examining Bd.*, 2003 WI App 147, P9, 265 Wis. 2d 781, 668 N.W.2d 112.

The interpretation of an administrative rule, like the interpretation of a statute, is generally a question of law, subject to de novo review. *Brown v. Brown*, 177 Wis. 2d 512, 516, 503 N.W.2d 280 (Ct. App. 1993) However, we accord controlling weight deference to an administrative agency's interpretation of its own promulgated rules, unless the interpretation is plainly erroneous or inconsistent with the language of its rules. *Pfeiffer v. Board of Regents of Univ. of Wis. Sys.*, 110 Wis. 2d 146, 154-55, n.12, 328 N.W.2d 279 (1983) (citations omitted).[4]

DISCUSSION

We discuss first the topic of whether the Board's construction of its rules of professional conduct is reasonable. We then address the application of each rule the Board concluded Bar-Av violated to the facts of record. We finally discuss the procedural errors Bar-Av complains of.

A. The Board's Interpretation of its Rules is Reasonable and Consistent with their Purpose

Bar-Av argues that the Board's interpretation of its rules of professional conduct is contrary to their plain language, and therefore is plainly erroneous.[5] Specifically, Bar-Av contends that the plain language of WIS. ADMIN. CODE § PSY 5.01(2) and (4) regulates unprofessional conduct in the *practice* of psychology only. Put another way, Bar-Av contends that the regulations relate specifically to the manner in which professional services are provided or performed; they do not address post-therapeutic conduct of a psychologist. Thus, according to Bar-Av, because the Board applied these rules to what both parties agree is conduct occurring after therapeutic services to Mr. A and Ms. B had terminated, the Board's interpretation of these rules is plainly erroneous and inconsistent with the purpose underlying these rules.

The Board counters that Bar-Av has not shown that its interpretation of WIS. ADMIN. CODE §PSY 5.01(2) and (4) is unreasonable, because he has failed to show that its interpretation is inconsistent with the language of these regulations. Specifically, the Board argues that none of these rules contain language specifically limiting their applicability to conduct occurring during the therapeutic relationship. Rather, according to the Board, construing these rules as applying to post-therapy conduct is necessary to effectuate the purpose of protecting the health, safety or welfare of former clients. We agree with the Board.

When interpreting an administrative rule, we apply many of the same rules used to interpret statutes. *See*

Brown, 177 Wis. 2d at 516. "Our purpose is to ascertain and give effect to the intent of the regulation." *Id.* (citation omitted). Interpretation of an administrative rule begins with the plain language of the regulation. *Id.* We give the text its common, ordinary, and accepted meaning, except that we give technical or specially defined words their technical or special definitions. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, P45, 271 Wis. 2d 633, 681 N.W.2d 110. In construing an administrative rule we are to give deference to the policy choices made by the agency in promulgating the rule. *See id.*, P44; *Brown*, 177 Wis. 2d at 516. "If [the rule] clearly and unambiguously sets forth the intent, it is our duty ... to apply that intent to the facts and circumstances of the question presented." *Brown*, 177 Wis. 2d at 516.

We begin by stating the purpose of the Board's rules of professional conduct. "Public protection underlies the psychology licensure requirements in sec. 455.04(1), Stats., and the grounds in sec. 455.09 to ... revoke ... a license to practice psychology." *Davis v. Psychology Examining Bd.*, 146 Wis. 2d 595, 600, 431 N.W.2d 730 (Ct. App. 1988). The Board explains that the purpose of these rules is to protect the health, safety or welfare of clients or patients.[6]

It is helpful to examine how the Board applied these rules to the facts of record to understand how the Board interpreted them. Before doing so, we first observe that there is nothing in the text of any of the rules at issue here indicating that the agency intended to limit their application to the period of the ongoing therapeutic relationship. The opposite is true; the plain language of WIS. ADMIN. CODE §PSY 5.01(2) and (4)

supports the Board's liberal interpretation and application of the rules to post-therapeutic conduct. We now turn to examine how the Board applied these rules to the facts as a means of understanding how the Board construed the rules.

1. WISCONSIN ADMIN. CODE §PSY 5.01(2)

As we noted earlier, at issue is the post-therapeutic relationship that developed between Bar-Av and Ms. B. The Board was concerned about how that relationship impacted both Mr. A and Ms. B. In finding that Bar-Av violated WIS. ADMIN. CODE § PSY 5.01(2) (gross negligence),[7] the Board was troubled by Bar-Av's apparent failure as a psychologist to consider the possible consequences that his relationship with Ms. B would have on both Mr. A and Ms. B. Most troubling to the Board was that Bar-Av pursued this relationship despite his knowledge of the problems Mr. A was treated for, which Bar-Av should have known would be exacerbated by his relationship with Ms. B. The Board put it this way:

What makes Mr. A's discovery about his former wife and Dr. Bar-Av all the more disturbing is the fact that Dr. Bar-Av, having extensively treated Mr. A over a period of several years, had to have known that his involvement with Ms. B would negatively impact Mr. A. It is inconceivable to imagine any other effect that such a discovery would have had. Indeed, Dr. Seaman agreed with that conclusion. According to Dr. Seaman's written report, the process of therapy broke down Mr. A's rigid and emotionally distant defenses, which were most likely related to his history of physical and sexual abuse by his older brother. Through the therapeutic

process, the report notes, Mr. A became dependent upon Dr. Bar-Av. In turn, Mr. A viewed Dr. Bar-Av as being quite powerful and threatening. In light of that, especially Mr. A's insecurity about "competitors" for his wife and his history of sexual dysfunction, Dr. Seaman concluded that "it is difficult to imagine a boundary violation which would have been more destructive than for Dr. Bar-Av to become involved with Ms. [B]."

The Board, referring to the expert report of Dr. Stephen F. Seaman, also pointed out that if Bar-Av was aware of the problems suffered by Mr. A and pursued a relationship with Ms. B regardless, "he was acting quite unprofessionally by disregarding the welfare of his former patient, Mr. A." The Board further stated that if Bar-Av was not aware of the possible impact his relationship with Ms. B would have on Mr. A, "it would demonstrate a lack of the most basic understanding of the therapy process so as to make him quite dangerous." Based on these observations, the Board concluded that Bar-Av committed gross negligence in the practice of psychology, in violation of WIS. ADMIN. CODE § PSY 5.01(2). In concluding that Bar-Av committed gross negligence the Board said:

By engaging in a sexual relationship with Ms. B, after having treated not only her, but also Mr. A, her former husband, it is inconceivable that Dr. Bar-Av would not consider the possible consequences that such a relationship might have on Mr. A, not to mention on Ms. B. Moreover, the fact that he went ahead with the relationship anyway, in spite of all the problems that he knew Mr. A had, is unquestionably conduct that constitutes gross negligence.

The Board's construction of WIS. ADMIN. CODE § PSY 5.01(2) as applying to post-therapeutic conduct is reasonable under these facts. The impact of Bar-Av's post-therapeutic conduct on Mr. A was substantial. It is reasonable for the Board to conclude that a psychologist commits gross negligence within the meaning of §§ PSY 1.02(6) and 5.01(2) when that psychologist is aware of a client's vulnerabilities but nonetheless engages in post-therapeutic conduct that demonstrates an indifference to or disregard of the potential impact that conduct may have on the former client. The Board therefore reasonably concluded that Bar-Av should have known that his personal and sexual relationship would have a harmful impact upon Mr. A. By construing and applying § PSY 5.01(2) to Bar-Av's post-therapeutic conduct, the Board acted to protect the health, safety or welfare of his former clients. We are satisfied that the Board's interpretation of § PSY 5.01(2) was reasonable and consistent with the rule's purpose.

2. WISCONSIN ADMIN. CODE § PSY 5.01(4)

We next look at how the Board applied WIS. ADMIN. CODE § PSY 5.01(4), which provides that a licensee engages in unprofessional conduct when the licensee's "[p]erformance of professional services [is] inconsistent with training, education, or experience." Similar to how the Board construed and applied § PSY 5.01(2), it observed that "[p]sychologists are trained and educated to maintain boundaries between themselves and their patients." In concluding that Bar-Av violated § PSY 5.01(4), the Board stated that "[b]y entering into a relationship with Ms. B, Dr. Bar-Av essentially disregarded any effect that such a relationship might

have on Mr. A. In doing so, he clearly failed to adhere to the boundaries that are inherent in the education and training one receives as a psychologist."

We conclude the Board's interpretation of WIS. ADMIN. CODE § PSY 5.01(4) rule as applying to Bar-Av's post-therapeutic conduct is reasonable and consistent with the purpose of the rule. As the Board explained, psychologists are trained to maintain boundaries between themselves and their clients, and Bar-Av's behavior was inconsistent with his training and experience by exceeding those boundaries in entering into a relationship with Ms. B. We also observe that by applying § PSY 5.01(4) to Bar-Av's post-therapeutic conduct, the Board properly signaled to other psychologists the importance of maintaining boundaries between the therapist and the former client, an objective consistent with the purpose of the rule.

On appeal, the Board discusses the transference phenomenon as an important reason for applying WIS. ADMIN. CODE § PSY 5.01(2) and (4) to post-therapeutic conduct. Seaman testified about transference. According to the Board, transference is a common feature of therapeutic relationships. *See also L.L. v. Medical Protective Co.*, 122 Wis. 2d 455, 461, 362 N.W.2d 174 (Ct. App. 1984). Transference "is the emotional reaction which the patient in therapy has toward the therapist. The patient in therapy 'unconsciously attributes to the psychiatrist or analyst those feelings which he may have repressed towards his own parents.'" *Id.* (citation omitted). "The patient 'develop[s] extreme emotional dependence on the therapist.'" *Id.* (citation omitted). The patient is healed by the resolution of these transferred feelings. *Id.* In

order to benefit from therapy, the patient must trust the therapist. *Id.* Transference, however, involves more than the trust involved in other professionals "to whose procedures a patient submits or whose advice a client accepts.... [I]t "involves the emotional fragility for which treatment may have been sought, and permits the exploitation of the vulnerability that may be present during the course of treatment." *Steven G. v. Herget*, 178 Wis. 2d 674, 687, 505 N.W.2d 422 (Ct. App. 1993). The Board explains on appeal that

[t]he development of this emotionally dependent trust relationship imposes a corresponding duty on the therapist to avoid any actions that betray the trust of a patient. If a therapist betrays the fragile trust that is the foundation of the treatment relationship, the entire course of treatment may be ruined and rendered ineffective or even harmful.

The Board also explains that the transference phenomenon continues after the therapeutic relationship terminates. It therefore follows, according to the Board, that conduct by a therapist after the therapeutic relationship has terminated "betrays the continuing trust of a patient i[n] mishandling ... the transference phenomenon that could ruin the professional services provided during formal therapy and harm the patient." Thus, in the Board's view, such a betrayal constitutes unprofessional conduct in the performance of professional services.

Bar-Av counters that the Board's interpretation of its rules could result in disciplining a therapist for how a therapist treated a patient "decades earlier, even though the discipline was based upon some recent

conduct found to be objectionable to the Board." But those are not the facts of this case. In any event, the burden rests with the Board to prove a violation of its rules. Under the Board's interpretation of its rules, the Board will be required to draw the requisite nexus between the treatment offered and the objectionable post-therapy conduct. Bar-Av's hypothetical does not persuade us that the Board's construction and application of the rules in this case will cause the future horrors Bar-Av complains of.

Bar-Av also argues that there is no legal authority supporting the Board's argument that the example of the transference phenomenon supports its construction of the rules. He asserts that the cases the Board relies on, *L.L.* and *St. Paul Fire and Marine Ins. Co. v. Love*, 459 N.W.2d 698 (Minn. 1990), do not apply. The primary issue in both cases was whether there was coverage under insurance policies invoked after a therapist had sexual relations with a client. *See L.L.*, 122 Wis. 2d at 457; St. Paul Fire, 459 N.W.2d at 699. Bar-Av misunderstands the purpose for which the Board refers to these cases. The Board relied on these cases to explain what the transference phenomenon is and how transference supports its construction and application of its rules to post-therapeutic conduct. We see no problem with how the Board uses these cases in support of its construction of its rules.

3. WISCONSIN ADMIN. CODE § PSY 5.01(14)

Bar-Av next asserts that because WIS. ADMIN. CODE § PSY 5.01(14) contains language expressly addressing post-therapeutic conduct, this reinforces his

view that § PSY 5.01(2) and (4) do not apply in the same manner. We disagree.

WISCONSIN ADMIN. CODE § PSY 5.01(14) addresses specific conduct, sexual contact with a client while therapy services are being provided and after those services have terminated. By their texts, § PSY 5.01(2) and (4) regulate a broader range of conduct. From the language of § PSY 5.01(14), it appears that the agency thought it important to more specifically regulate sexual activity between a psychologist and a client. This is likely because the applicable standard of care is such that a sexual relationship between a psychologist and a client, even after two years, is more the exception than the rule. *See* § PSY 5.01(14)(c). By proscribing sexual activity between a psychologist and a former client, the agency expressed a specific policy determination that this type of conduct exceeds the scope of appropriate professional conduct. This fact, however, does not necessarily mean that the agency intended that its other rules apply only during an ongoing therapeutic relationship. By not providing language limiting the application of these two rules to behavior occurring only during the ongoing therapeutic relationship, it is reasonable to conclude that the agency intended these rules to apply to post-therapeutic conduct by psychologists as well.

4. WISCONSIN ADMIN. CODE § PSY 5.01(17)

Regarding WIS. ADMIN. CODE § PSY 5.01(17), Bar-Av argues that this rule applies only to dual relationships established during an ongoing therapeutic relationship. We agree with Bar-Av that this rule may be construed this way. However, we conclude that the

Board's construction of the rule is not plainly erroneous or inconsistent with the language of the rule. We look to how the Board applied § PSY 5.01(17) to see how it has construed this rule.

WISCONSIN ADMIN. CODE § PSY 5.01(17) states that it is unprofessional conduct to fail to avoid dual relationships. In concluding that Bar-Av engaged in unprofessional conduct by developing a dual relationship with Ms. B, the Board focused on two areas of concern. First, the Board observed that the evidence does not demonstrate a clear line between the end of the therapeutic relationship and the development of the personal relationship between Bar-Av and Ms. B. The Board found that Bar-Av and Ms. B met for coffee within several weeks following the last therapy session, "to discuss her psychological needs, more specifically, what type of support group might be good for her." They also met occasionally "to discuss computer technology and issues related to the businesses Ms. B still owned with Mr. A." The Board further found that from June 28, 1996 until September 16, 1996, Ms. B provided transportation for Bar-Av because he was unable to drive as a result of a seizure. It was during this time that Ms. B and Bar-Av began to develop their personal relationship, which, according to the Board's findings, still existed at the time the Board rendered its decision.

The Board was also concerned about what it perceived as conduct by Bar-Av demonstrating a greater concern for his needs than for his former client, Ms. B. The Board found "that between April of 1997 and March of 1999, [Ms. B] gave Dr. Bar-Av the following: $5000.00, a 1996 Volvo automobile for his use, and a computer and

printer valued at approximately $3700.00." The Board also found that "[i]n September of 2000, Ms. B provided Dr. Bar-Av with $1980.00, in the form of a check." The Board pointed out that Bar-Av had repaid very "little, if any," of the money Ms. B gave him, including the $5000 she had obtained from her mother. Consequently, Ms. B was unable to repay her mother prior to her mother's death. It appeared to the Board that Ms. B "had obvious misgivings" about loaning that money to Bar-Av.

In concluding that Bar-Av engaged in unprofessional conduct within the meaning of WIS. ADMIN. CODE § PSY 5.01(17), the Board made the following observation:

The resulting rides, the purchase of an automobile, and the giving of money to Dr. Bar-Av were all a direct result of Dr. Bar-Av's needs, and not those of Ms. B's. As Dr. Seaman aptly summarized it, "This is typical of the development of their relationship, as an evolution of the therapy relationship into something more, with no clear boundaries, and the changes in the relationship often resulting from Dr. Bar-Av's needs, rather than Ms. B's." Thus, Dr. Bar-Av very plainly failed to avoid a dual relationship that was obviously rife with the potential for financial, legal, and psychological conflicts.

We agree with Bar-Av that it may be counterintuitive to think that a psychologist may violate the rule regarding dual relationships by engaging in certain post-therapeutic relationship conduct. But the facts of this case provide a good scenario illustrating a reasonable application of this rule. The Board observed that it was difficult to ascertain where the therapeutic relationship between Bar-Av and Ms. B ended and

where the personal relationship began. In other words, the boundaries between therapist and client in this case are not clear. Thus, it appeared to the Board that, at least during the period when Bar-Av and Ms. B began meeting socially and Ms. B provided transportation and money to Bar-Av, the therapeutic relationship was ongoing. What was clear to the Board was that Bar-Av directed Ms. B's attention to his needs, rather than maintaining professional distance so as to prevent any conflict of interest from occurring. We cannot say that the Board's interpretation and application of WIS. ADMIN. CODE § PSY 5.01(17) in this manner is plainly erroneous or inconsistent with the purpose of the rules of professional conduct.

In sum, we conclude, applying controlling weight, that the Board's interpretation of WIS. ADMIN. CODE § PSY 5.01(2), (4) and (17) is not plainly erroneous and is consistent with the purpose of the rules. We agree with the Board that there is no language in either § PSY 5.01(2) or (4) shielding a psychologist from discipline for conduct occurring after the termination of the treatment relationship that adversely affects the services provided during the treatment relationship. We also agree with the Board that § PSY 5.01(17) may be interpreted as applying to post-therapeutic conduct when that conduct creates a financial, legal and psychological conflict of interest with a former client. We acknowledge that the language of these rules is not a paragon of clarity. However, we cannot say that the Board's interpretation of them is plainly erroneous.

B. The Board's Findings and Conclusions are Supported by Substantial Evidence

Bar-Av appears to argue that the Board's findings and conclusions relating to WIS. ADMIN. CODE § PSY 5.01(14) and (17) are not supported by substantial evidence.[8] More specifically, Bar-Av complains that there are no facts supporting the Board's conclusion that Bar-Av had a dual relationship with Ms. B or that she was exploited. He contends that the facts "clearly and unequivocally" demonstrate "a clear line of demarcation between the termination of therapy for Ms. B, and the emergence of a personal friendship between Dr. Bar-Av and Ms. B ...." In short, Bar-Av asserts that the Board's findings do not support its conclusion that he was involved in a dual relationship with Ms. B. He also asserts that there is no evidence supporting the Board's conclusion that Ms. B was exploited, or that she considered herself to be exploited. We disagree.

We will uphold an agency's findings of fact if supported by substantial evidence. WIS. STAT. § 227.57(6). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hacker v. DHSS*, 197 Wis. 2d 441, 467, 541 N.W.2d 766 (1995) (citations omitted). Where different conclusions may be drawn from the same substantial evidence, we defer to the choice of the agency as to which conclusion it accepts, so long as that choice is reasonable. *See Hamilton v. DILHR*, 94 Wis. 2d 611, 617-18, 288 N.W.2d 857 (1980).

We conclude that the record supports the Board's conclusion that Bar-Av violated WIS. ADMIN. CODE § PSY 5.01(17) by engaging in a dual relationship with Ms. B. We also conclude that there is substantial

evidence that Ms. B was exploited, within the meaning of § PSY 5.01(14)(c).

As we have explained, the Board concluded that Bar-Av engaged in an impermissible dual relationship with Ms. B, in violation of WIS. ADMIN. CODE § PSY 5.01(17). A dual relationship is defined as "a situation in which a psychologist provides professional services to a person with whom the psychologist has another relationship such as, but not limited to, relatives, close friends, employees or employers, students or other supervisees." WIS. ADMIN. CODE § PSY 1.02(5m). The Board observed that "there was no clear ending of the therapeutic relationship and the independent development of a separate one." Applying the ALJ's analysis of the facts, the Board concluded that Bar-Av violated § PSY 5.01(17). The undisputed facts surrounding the development of Bar-Av's personal relationship with Ms. B support the Board's conclusion.

According to the undisputed facts, Ms. B's last therapy session with Bar-Av occurred in December 1995. Thereafter, Bar-Av and Ms. B occasionally met over coffee to discuss various topics, including locating a divorce support group for Ms. B and computer technology topics. Then in approximately late June 1996, Bar-Av lost his driving privileges due to suffering a seizure. Ms. B transported Bar-Av in her car for approximately three months. During this time they developed a personal relationship, evolving into a sexual relationship in April 1998. In addition, Ms. B gave substantial sums of money to Bar-Av, as well as computer equipment, and bought Bar-Av a 1996 Volvo. These facts support the Board's findings, as well as the Board's conclusion that Bar-Av had engaged in

unprofessional conduct in violation of WIS. ADMIN. CODE § PSY 5.01(17)'s prohibition of dual relationships.

We also conclude that the record supports the Board's conclusion that Bar-Av exploited Ms. B in violation of WIS. ADMIN. CODE § PSY 5.01(14). Most relevant to Bar-Av's case is § PSY 5.01(14)(c), which prohibits a psychologist from engaging in sexually related activity with a former client beyond two years of termination of professional services unless the psychologist can demonstrate there has been no exploitation of the former client in light of all relevant factors, including those enumerated in the rule. In other words, under § PSY 5.01(14), the general rule is that a psychologist is prohibited from having sex with a client or former client for two years. Thereafter, a psychologist may become sexually involvedwith a former client without violating the rule, but only if the psychologist presents sufficient evidence when facing a charge of violating this rule that one or more exceptions to the general rule prohibiting sexual contact applies. WIS. ADMIN. CODE § PSY 5.01(14)(c).

The party alleging a rule violation has the burden of proving the violation; the party relying on an exception to a rule has the burden of proving the exception. *Ranes v. American Family Mut. Ins. Co.*, 212 Wis. 2d 626, 635, 569 N.W.2d 359 (Ct. App. 1997). Consequently, it was Bar-Av's burden under WIS. ADMIN. CODE § PSY 5.01(14)(c) to establish that his sexual relationship with Ms. B was free from exploitation. The Board met its initial burden of proving Bar-Av committed a prima facie violation of § PSY 5.01(14)(c) when Bar-Av conceded that he had a sexual relationship with Ms. B.

The burden then shifted to Bar-Av to prove that one or more of the exceptions in $ SPSY 5.01(14)(c) applied. The Board reasonably concluded that he failed to do so.

The Board relied on various factors showing that Bar-Av failed to establish that Ms. B was not exploited. Keeping in mind that under WIS. ADMIN. CODE § PSY 5.01(14)(c) Bar-Av had the burden of producing evidence that Ms. B was not exploited, the Board first noted that Bar-Av failed to provide any facts that established a clear separation between the therapeutic relationship and the development of a separate and independent relationship. The Board also observed that Bar-Av failed to provide any evidence that he had considered the factors in § PSY 5.01(14)(c) before entering into a sexual relationship with Ms. B. More troubling for the Board was that, in spite of the fact that Bar-Av was aware of Mr. A's vulnerability, especially of his expressed fear that Bar-Av and Ms. B would develop such a personal relationship, Bar-Av became sexually involved with Ms. B. The Board explained:

Knowing Mr. A as he did, it is incomprehensible that Dr. Bar-Av even contemplated becoming involved with Ms. B, let alone, actually becoming involved with her. His conduct is clearly a violation of s. Psy 5.01 (14), Wis. Admin. Code, particularly when one factors in his extensive therapeutic relationships with both Mr. A and Ms. B, the power balance that existed between him and Ms. B, and the overwhelming evidence that his needs were being met versus Ms. B's. What consistently emerges throughout the relationship between Dr. Bar-Av and Ms. B is that whenever Dr. Bar-Av needed something, be it transportation, a

computer, or money, Ms. B was always at the ready to provide it to him. In taking this approach to his needs, Dr. Bar-Av either failed to consider its effects or simply disregarded them. Whichever the case may be, it demonstrates Dr. Bar-Av's indifference to his professional obligations as a psychologist.

Bar-Av insists that there is no evidence demonstrating that Ms. B felt exploited. His view of the record is that Ms. B willingly entered into a personal relationship with Bar-Av and that she trusted Bar-Av. The Board argues that Ms. B was likely experiencing transference when she and Bar-Av developed a personal relationship. In any event, the Board considered the evidence offered at the disciplinary hearing and, based on that evidence, determined that Bar-Av violated WIS. ADMIN. CODE § PSY 5.01(14). We conclude there was substantial evidence supporting the Board's reasonable conclusion that, under these facts, Bar-Av engaged in unprofessional conduct under this rule.

C. Procedural Arguments

Bar-Av argues that substantial errors committed during the evidentiary hearing deprived him of his right to a fair hearing. In particular, he argues that the ALJ erroneously prohibited him from asking Seaman certain questions on cross-examination; erroneously allowed Seaman to review materials before the hearing, including a psychological evaluation that was subject to an agreement limiting its admissibility; and erroneously allowed Seaman to testify despite what Bar-Av characterizes as a conflict of interest. We are not persuaded by any of these arguments.

Admission of evidence is a matter of agency discretion; we will uphold the discretionary decision if there is a reasonable basis for it. *See Board of Regents v. State Pers. Comm'n*, 2002 WI 79, P26, 254 Wis. 2d 148, 646 N.W.2d 759. "A proper exercise of discretion must be based on facts appearing in the record and on the appropriate and applicable law." *Id.*

1. Cross-examination of Dr. Seaman

We first address Bar-Av's argument that the ALJ violated WIS. ADMIN. CODE § RL 2.15(3)[9] and Bar-Av's due process rights when she prohibited him from cross-examining Seaman regarding his experience performing forensic evaluations and the American Psychologist Association's standards for forensic evaluations. When Bar-Av attempted to question Seaman regarding the forensic evaluation standards, counsel for the DOE objected on the basis that no forensic evaluation was involved in the case and that Seaman's testimony was limited to offering an expert opinion on whether Bar-Av's conduct violated any of the rules of professional conduct. The ALJ sustained the objection, agreeing that Seaman was never asked to conduct a forensic evaluation. The ALJ concluded that whether Seaman was qualified as a forensic psychologist was not at issue and sustained the objections on relevancy grounds. More specifically, the ALJ stated that the scope of Seaman's testimony was related to offering "an expert opinion as to whether or not [Bar-Av's] conduct as a psychologist was at or below the minimally competent standards for a psychologist."

Bar-Av argues that the ALJ denied him his right to

cross-examine Seaman on the topic of "relevant professional standards for the work that the expert performed." He points to the fundamental rule that notions of fairness and due process support his right to cross-examine a witness. We agree with Bar-Av that the right to cross-examine a witness is fundamental in our legal system. However, Bar-Av fails to explain why Seaman's testimony on the topic of the American Psychological Association's standards for forensic evaluations was relevant to the topic of whether Bar-Av violated the rules of professional conduct. He does not dispute that Seaman was called to testify on the rules of professional conduct. Bar-Av also fails to explain how prohibiting him from cross-examining Seaman on the standards for forensic evaluations denied him his right to a fair hearing.

2. Admission of Psychological Examination Evidence

Bar-Av next argues that he was deprived a fair hearing when the Board violated a pre-hearing agreement, the terms of which limited the use of a psychological evaluation performed on Bar-Av by Dr. John Gonsiorek. Counsel for the DOE gave Seaman a number of documents to review, including the report of that psychological evaluation, from which Seaman was asked to develop his expert opinion on whether Bar-Av violated the rules of professional conduct. The agreement provided that the DOE's counsel would not introduce as evidence at the hearing any information DOE receives from [Gonsiorek] as a result of this agreed upon evaluation for the purpose of proving that [Bar-Av] has engaged in the conduct alleged in the investigative file which would be a violation of a statute or rule which would subject [Bar-Av] to discipline.The

parties also agreed that the DOE's counsel may use any information obtained from the evaluation, among other purposes not applicable here, to determine the proper discipline if the Board found Bar-Av violated any of the rules. We conclude that the Board did not violate this agreement by making the report available to Seaman prior to the hearing to help him form his expert opinions regarding whether Bar-Av's conduct was below the minimum standards for a psychologist.

The agreement relating to the psychological evaluation prohibited the evaluation from being *introduced as evidence* as proof that Bar-Av violated the rules of professional conduct. Nothing in the agreement prohibits Seaman from considering Gonsiorek's evaluation in formulating an opinion whether or not Bar-Av's conduct was unprofessional. More significantly, Bar-Av fails to point to any information from the evaluation which was introduced as evidence at the disciplinary hearing. Seaman testified that he had read the evaluation, but that he did not recall anything in the evaluation that he had not learned from other sources. Seaman also testified that he would have arrived at the same opinions he testified to without the evaluation. We are satisfied that the Board's counsel did not violate the terms of the agreement regarding the use of the psychological evaluation performed by Gonsiorek. It also does not appear that Bar-Av suffered any prejudice from the disclosure of the Gonsiorek report to Seaman.

3. Conflict of Interest

Bar-Av argues that he was denied a fair hearing and that his due process rights were violated because

Seaman, who once served on the Psychology Examining Board, was allowed to testify, despite what Bar-Av viewed as a conflict of interest. Bar-Av contends that Seaman was on the Psychology Examining Board when the Board decided to take disciplinary action against Bar-Av. Bar-Av argues that because Seaman had been a member of the Psychology Examining Board at the time this disciplinary action was commenced, Seaman should not have been allowed to testify as an expert witness. We disagree.

Bar-Av mischaracterizes the facts when he argues that Seaman was a member of the Board when this disciplinary action was instituted. Although Seaman had once been a member of the Board, he left the Board in February 2000, long before the complaint against Bar-Av was filed on March 24, 2003. Ultimately, the complaint charging Bar-Av with unprofessional conduct was not even filed by the Board, but was filed by a prosecutor employed by the DOE. In addition, although Seaman was on the Board when the case against Bar-Av was opened for investigation in September 1999, Seaman was not a member of the panel that screened the complaint against Bar-Av to determine whether an investigation should be initiated.

Bar-Av also fails to point to any evidence that Seaman had access to details about open cases in general when he was on the Board, let alone Bar-Av's. Seaman testified that he had no knowledge of the facts of this case, and no familiarity with Bar-Av prior to this case other than general awareness of his name. In sum, nothing in the record suggests that Seaman had any involvement whatsoever in this case prior to his participation as an expert witness. Consequently,

Seaman had no demonstrable conflict of interest that would have prevented him from testifying as an expert witness at the disciplinary hearing.

Bar-Av also argues his due process rights were violated because Seaman served on the Board. He relies on *Bracegirdle v. DRL*, 159 Wis. 2d 402, 413, 464 N.W.2d 111 (Ct. App. 1990), in support. In *Bracegirdle*, we reviewed a trial court's order reversing an order from the Board of Nursing, Department of Regulation and Licensing disciplining a nurse, Bracegirdle, for abusing a patient. *Id.* at 409-10. On appeal, Bracegirdle argued, in part, that the nursing board denied her right to an impartial decisionmaker because the chair of the nursing board acted both as an advisor who helped the prosecutor prepare charges against her and also participated in the board's deliberations and decision to reprimand Bracegirdle. *Id.* at 412-13. We rejected her argument, holding that even where a decisionmaker for the board served in a dual role as an advisor to the prosecutor, Bracegirdle failed to establish special facts and circumstances demonstrating an intolerably high risk of unfairness, rebutting the presumption of honesty and integrity of administrative adjudicators. *Id.* at 414-15.

Bar-Av's reliance on *Bracegirdle* is misplaced. Indeed, *Bracegirdle* cuts against Bar-Av. In *Bracegirdle*, we rejected a similar challenge to the impartiality of an administrative adjudicator who doubled as an advisor to the prosecutor. Here, Seaman was not even an adjudicator. The record shows that Seaman had no decision-making authority over Bar-Av's case whatsoever; therefore, the potential conflict presented here is even less apparent than in *Bracegirdle*. We

conclude that Bar-Av has failed to establish special circumstances demonstrating an intolerably high risk of unfairness, *id.* at 414-15; therefore, the Board's decision to allow Seaman to testify was reasonable.

CONCLUSION

Applying controlling weight deference, we conclude that the Board's interpretation of its own rules of professional conduct is reasonable and consistent with the purpose of the rules. We also conclude that the Board's findings of fact and conclusions of law are supported by substantial evidence. Finally, we conclude that Bar-Av was afforded a fair hearing and that his due process rights were not violated. We therefore affirm the circuit court's order affirming the Board's decision to revoke Bar-Av's license to practice psychology based upon findings of professional misconduct, in violation of WIS. ADMIN. CODE § PSY 5.01(2), (4), (14) and (17).

By the Court.--Order affirmed.

Footnotes

[1]WISCONSIN ADMIN. CODE § PSY 5.01 addresses professional conduct requirements for psychologists and states, in relevant part:

The practice of psychology is complex and varied and, therefore, allows for a broad range of professional conduct. The following acts constitute unprofessional conduct by applicants for licensure and licensees of the board and are prohibited. Complaints regarding these acts shall be investigated and may lead to disciplinary

proceedings.

....

(2) Gross negligence in the practice of psychology.

....

(4) Performance of professional services inconsistent with training, education, or experience.

....

(14) Engaging in sexual contact, sexual conduct, kissing, or any other behavior which could reasonably be construed as seductive, romantic, harassing, or exploitative, with any of the following:

(a) A client.

(b) A former client within 2 years of termination of professional services.

(c) A former client beyond 2 years of termination of professional services, unless the licensee can demonstrate that there has been no exploitation of the former client ....

....

(17) Failure to avoid prohibited dual relationships.

[2]In his opening brief, Bar-Av failed to provide appropriate record citations, in violation of WIS. STAT. RULE 809.19(1)(d) (2003-04) of the rules of appellate

procedure. RULE 809.19(1)(d) requires parties to set out facts "relevant to the issues presented for review, with appropriate references to the record." An appellate court is improperly burdened where briefs fail to properly cite to the record. *See Meyer v. Fronimades*, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957).

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3]Although the Board did not expressly incorporate the ALJ's opinion into its order, the Board determined that the ALJ's opinion contained a useful analysis of the evidence. Throughout this opinion we will refer to the ALJ's opinion as the Board's opinion.

[4] On appeal, the Board questions whether we intended to modify this standard through language in a footnote in *Kruczek v. DWD*, 2005 WI App 12, 278 Wis. 2d 563, 692 N.W.2d 286, in which, after discussing the deference we accord an agency's interpretation of its own rules, we noted that "[t]here are lower levels of deference." *Id.* at P12 n.3. We note that the lower levels of deference referenced in the *Kruczek* footnote apply to cases involving an agency's interpretation of statutes. *See id.*, citing *Sauk County v. WERC*, 165 Wis. 2d 406, 413-14, 477 N.W.2d 267 (1991). Consequently, we do not read *Kruczek* as changing the standard of review of an agency's interpretation of its own rules. In addition, the supreme court recently reaffirmed the well-established rule of reviewing an agency's interpretation of its own rules in *Orion Flight Servs., Inc. v. Basler Flight Serv.*, 2006 WI 51, P18, 290 Wis. 2d 421, 714 N.W.2d 130 ("[T]his court gives deference to an agency's settled 'interpretation and

application of its own administrative regulations unless the interpretation is inconsistent with the language of the regulation or is clearly erroneous.'") (citation omitted).

[5]Bar-Av asserts that because the Board's interpretation of its rules is plainly erroneous, it therefore lacks jurisdiction in this case. This argument is undeveloped. We need not address an argument inadequately briefed. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[6]Under WIS. ADMIN. CODE §PSY 1.02(3), the word "client" "includes the term and concept of 'patient.'"

[7]WISCONSIN ADMIN. CODE § PSY 1.02(6) defines "Gross negligence in the practice of psychology" as

the performance of professional services that do not comply with an accepted standard of practice that has a significant relationship to the protection of the health, safety or welfare of patient or public, and that are performed in a manner indicating that the licensee knew or should have known, but acted with indifference to or disregard of, the accepted standard of practice.

[8]Bar-Av also appears to continue his argument that the Board's construction and application of the rules of professional conduct governing psychologists is in conflict with the plain language of these rules. Because we rejected this argument in the previous section of this opinion, we do not address it here.

[9]WISCONSIN ADMIN. CODE § RL 2.15 addresses the conduct of an administrative hearing and states in

relevant part, "(3) EVIDENCE. The complainant and the respondent shall have the right to appear in person or by counsel, to call, examine, and cross-examine witnesses and to introduce evidence into the record."

STATE OF WISCONSIN
BEFORE THE PSYCHOLOGY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST ZE'EV BAR-AV Ph.d., Respondent

Final Decision and Order
Case No. LS0303251PSY

***

PROCEDURAL HISTORY

A hearing in the above-captioned matter was held on July 28-August 1, 2003 before Administrative Judge Jacquelynn B. Rothstein. The Division of Enforecement appeared by attorney John R. Zwieg. Dr. Bar-Av appeared pro se.

The ALJ filed a Proposed Decision on October 1, 2003. Dr. Bar-Av filed a written response on October 4. Mr. Zwieg filed objections on October 6. On Ootber 9, Dr. Bar-Av filed a request for extension of the October 16 deadline. On October 27, Attorney George B. Strother of Krekeler Strother, S.C., 15 N. Pinckney St., Suite 200, Madison, WI 53701-0828 filed a Notice of Retainer and Objections for Dr. Bar-Av. Mr. Zwieg filed objections on October 29.

Based on the entire record in this case, including the testimony and other evidence presented at the hearing, the Proposed Decision filed by the ALJ on October 1, 2003 and the objections filed by both parties, the

Psychology Board issues this Final Decision and Order.

1. Ze'ev Bar-Av, Ph.D., (DOB 9/28/41) is a Wisconsin licensed psychologist. His license was granted on June 27, 1978. Dr. Bar-Av's current address is P.O. Box 45276 in Madison, Wisconsin.

2. In April of 1992, Mr. A. and Ms. B had been married for twenty-one years. From April 2, 1992, through March 4, 1993, they saw Dr. Bar-Av for therapy at Psychiatric Associates in Beaver Dam, Wisconsin. During that time, Mr. A and Ms. B had forty-nine joint sessions with Dr. Bar-Av, most of which lasted for one hour.

3. Dr. Bar-Ave also provided individual psychotherapy to Mr. A and Ms. B. Mr. A had twelve individual sessions with Dr. Bar-Av from April 2, 1992, through December 17, 1992. Ms. B had forty-six individual sessions with him from April 23, 1992, through March 2, 1993.

4. Between April 2, 1992, and March 2, 1993, Mr. A had sixty-one sessions with Dr. Bar-Av (12 individual and 49 joint), while Ms. B had ninety-five session with Dr. Bar-Av (46 individual and 49 joint).

5. During the course of therapy, Dr. Bar-Av obtained Mr. A's psychiatric treatment records. Those records indicated that in 1978, Mr. A had experienced sexual dysfunction and very significant jealousy and insecurity relating to Ms. B's first husband.

6. At the beginning of treatment, Dr. Bar-Av identified Mr. A as quite guarded and having significant

trust issues. He also noted that Mr. A had feelings of insecurity and jealousy. Dr. Bar-Av's treatment goal was to have Mr. A open up emotionally.

7. During individual sessions, Mr. A revealed a history of having been abused as a child, resulting in doubts about his masculinity and power, Mr. A told Dr. Bar-Av that he was concerned his wife would end their relationship after he revealed the abuse to her.

8. Dr. Bar-Ave provided therapy intended to break down Mr. A's rigid and emotionally distant defenses. As a result, Mr. A's insecurity and feelings of vulnerability increased, and he became dependent upon Dr. Bar-Ave, who he saw as quite powerful and, at times, as quite threatening.

9. In March of 1993, Dr. Bar-Av left Psychiatric Associates and relocated his practice to Madison, Wisconsin. In their joint therapy sessions prior to his departure, Dr. Bar-Av discussed with Mr. A and Ms. B issues relating to termination of therapy. Dr. Bar-Av noted that Mr. A had abandonment issues as a result of the termination of therapy caused by his move. He also noted that Mr. A had remarked that he had never been as close to another male as he had become with Dr. Bar-Ave during that year. Dr. Bar-Av told Ms. B and Mr. A that, if the need arose, they were welcome to resume therapy with him in Madison.

10. Thereafter, Mr. A's and Ms. B's marital relationship quickly began to deteriorate and in May of 1993, Mr. A and Ms. B resumed joint relationship therapy with Dr. Bar-Av. Mr. A and Ms. B continued to live in Beaver Dam and traveled to Madison for joint

and individual session. Dr. Bar-Av conducted the therapy sessions in the living room of his residence in Madison. In addition to the joint sessions, both Mr. A and Ms. B resume individual psychotherapy with Dr. Bar-Av.

11. Dr. Bar-Av does not have any treatment of billing records relating to the professional services he provided to Mr. A or Ms. B in Madison. He contends that all the records were lost due to a computer malfunction.

12. Mr. A's and Ms. B's money market checkbook shows the following payments made to Dr. Bar-Av for psychotherapy before that account was closed:

6/17/93	$188	12/23/93	$630	08/20/93	$150
7 /29/93	$150	04/23/94	$600	09/16/93	$150
8/24/93	$150	08/17/94	$900	10/22/93	$787.50
9/23/93	$150	12/07/94	$750	02/18/94	$900
11/18/93	$825	07/15/93	$150	06/23/94	$750
3/24/93	$750	08/12/93	$280	10/26/94	$750
7/21/94	$750	09/09/93	$150		
11/22/94	$750	10/07/93	$180		
07/02/93	$150	01/21/94	$600		
08/05/93	$150	05/19/94	$675		
09/02/93	$150	09/??/94	$675		
09/30/93	$150	07/23/93	$150		

13. During therapy, Mr. A told Dr. Bar-Av that he had the following three fears: Ms. B would leave him; Ms. B would move to Madison; and Ms. B would move in with Dr. Bar-Av.

14. Mr. A last saw Dr. Bar-Av for joint therapy in September or October of 1994. At that last session, Dr. Bar-Av provided Mr. A with the following advice: that he should find a new therapist; he should get some antidepressant medication; and he should get an attorney.

15. In December of 1994, Ms. B moved her residence to a location on the same side of Madison as Dr. Bar-Av's apartment. Ms. B continued to work in Beaver Dam until 1996. Ms. B's individual psychotherapy with Dr. Bar-Av continued through 1995.

16. Ms. B filed for divorce from Mr. A on May 9, 1995.

17. Ms. B had two-hour individual psychotherapy sessions with Dr. bar-Av on the following dates in 1995: January (3,12,19,26) February (2,3,9,16,17,23) March (2,7,9,14,21,28) April (4,6,11,20,25,27) May (4,9,16,23,30) June (6,13,20,29) July (6,11,20,25,27) August (3,10,17,22,31) August (3,10,17,22,31) September (7,14,21,28) October (5,12,19,26) November (2,9,16,30) December (7,14,21,28)

18. Ms. B maintains that her therapy with Dr. Bar-Av ended on December 28, 1995. Dr. Bar-Av does not recall when therapy ended and has no records to assist his recall.

19. Shortly after concluding therapy with Dr. Bar-Av, Ms. B asked him for assistance in finding a support group for people going through divorce. Dr. Bar-Av and Ms. B met at a local coffee shop to discuss her options. Ms. B also met occasionally with Dr. Bar-Av to discuss

computer technology and issues related to the business Ms. B still owned with Mr. A.

20. From June 28, 1996, until September 16, 1996, Dr. bar-Av lost his driving privileges as a result of a seizure. During this time Dr. Bar-Av was unable to drive, Ms. B provided him with transportation by driving him in her car, and the two developed a personal relationship, which continues to this date.

21. Mr. A's and Ms. B's marriage ended with a judgment of divorce on July 18, 1996.

22. Ms. B estimates that she and Dr. Bar-Av first engaged in sexual contact in April of 1998.

23. In June of 1998, Mr. A sought psychotherapy with Nina Bartell, Ph. D. She diagnosed Mr. A as having an adjustment disorder with mixed anxiety and depressed mood.

24. In July of 1998, Ms. B moved back to Beaver Dam.

25. Ms. B acknowledged that between April of 1997 and March of 1999, she gave Dr. bar-Av the following: $5000.00, a 1996 Volvo automobile for his use, and a computer and printer valued at approximately $3700.00

26. In September of 2000, Ms. B provided Dr. Bar-Av with $1980.00, in the form of a check.

CONCLUSIONS OF LAW

1. The Psychology Examining Board has jurisdiction in this matter pursuant to § 455.09, Wis. Stats.

2. By entering into a sexual relationship with Ms .B, which Dr. Bar-Av knew or should have known would have a harmful impact upon Mr. A, his former client, he engaged in unprofessional conduct in violation of §§ Psy 5.01 (2) and (4), Wis. Admin. Code.

3. By entering into a personal and sexual relationship with Ms. B, his former client, he engaged in unprofessional conduct in violation of §§ Psy. 5.01 (14) and (17), Wis. Admin. Code.

ORDER

IT IS ORDERED that the license to practice as a psychologist in the State of Wisconsin issued to Ze'ev Bar-Av is revoked as of the date of this Order.

IT IS FURTHER ORDERED that Ze'ev Bar-Av pay the costs of the Department of Regulation and Licensing In this matter, to be determined and set in a separate cost order.

EXPLANATION OF VARIANCE

The Psychology Examining Board reviewed the record of this disciplinary proceeding, including the testimony and other evidence presented at the hearing, the ALJ's Proposed Decision, and the objections filed by both parties. The Board adopted the Findings of Fact and Conclusions of Law prepared by the ALJ but it varied from the proposed order.

The recommended order of a two-year suspension would be ultra vires. Section 457.09, Stats., grants the Psychology Examining Board the power to reprimand a licensee, to revoke a license, to limit a license, or to suspend a license "for a period not exceeding one year." Dr. Bar-Av's actions resulted in a serious dual relationship violation and an egregious crossing of professional boundaries. A suspension of on e year or less would unduly depreciate the seriousness of Dr. bar-Av's conduct, and revocation is fully justified. Faced with its available disciplinary alternatives, the Board varies from the ALJ's recommendation and revokes Dr. Bar-Av's license.

The Board also orders Dr. Bar-Av to pay the costs incurred by the Department of Regulations and licensing in investigating, prosecuting and adjudicating this case. Although she did not include an order for costs in her recommendation, the ALJ clearly intended such an order as can be seen from her opinion, and the Board adopts the ALJ's reasoning in issuing its order. Because it contains useful analysis of the evidence, as well as a clear statements that the imposition of costs is appropriate and was contemplated, the Administrative Law Judge's Opinion is included as an Appendix to this Order.

Signed and Dated: 11/18/2003

FOR THE PSYCHOLOGY EXAMINING BOARD
Mariellen Fischer, Ph.D., Chair.

APPENDIX

Administrative Law Judge's Opinion

In 1992, Dr. Bar-Av was working as a psychologist at Psychiatric Associates in Beaver Dam, Wisconsin. Beginning in April of 1992, Mr. A and Ms. B began seeing Dr. Bar-Av for marriage counseling. They continued counseling with Dr. Bar-Av at his office in Beaver Dam until March of 1993. During that period of time, Dr. Bar-Av counseled Mr. A and Ms. B both individually and as a couple. At the outset of therapy, Dr. Bar-Av identified Mr. A as being quite guarded and having significant trust issues. That opinion was supported by Stephen F. Seaman, Ph.D., the Division of Enforcement's expert witness, who testified on direct examination as follows:

Q: Is Exhibit 4 also a portion of the records that you reviewed from Psychiatric Associates regarding [Ms. B and Mr.A]?
A: Yes, it is.
Q: Dr. Seaman, was there – well, why don't you tell us a little of what – how you perceived Mr. A based on these treatment records. What was there about him that's significant to this matter.
A: What was significant is that the treatment notes would indicate that he was a rather emotionally shut down and rigid individual who was very jealous and controlling in the relationship, was very uncomfortable, had difficulty trusting others, including his wife, and over time during the course of treatment became much more open emotionally. And while that appeared to be helpful to his functioning, by his statements, and to the marriage, he also felt quite vulnerable and exposed during the process and was frequently concerned, it appeared from the record, that in some sense he was being scapegoated or identified as the problem in the marriage. (Tr. At 202).

The treatment notes also indicate that Mr. A was abused as a child. By revealing that information, along with other personal details about his life, Mr. A came to trust and depend upon Dr. Bar-Av. That perception was also supported by Dr. Seaman's testimony on direct:

Q: What do you remember about the older brother?
A: What I remember is that the treatment notes indicated that [Mr. A] reported that his older brother was abusive, particularly sexually abusive, but also in other ways as well.
Q: There was testimony yesterday that [Mr. A] had never disclosed that, at least one act of sexual abuse by his brother, to anyone prior to talking about it during the treatment session. Will you consider that, please?
A: Okay.
Q: All right. The fact that he did reveal this during a treatment session with Dr. Bar-av and his wife [Ms. B] present, does that enter into your opinion in any manner?
A: Yes, it does.
Q: And how is that?
A: Well, it factors in in several ways, in that it would appear based on the record that this was an important step forward in therapy and was most likely helpful to him and to the marriage but it also, based partly upon the record but also based upon my own clinical experience, that when an individual reveals this type of information for the first time, they are typically very, and the records would indicate that that was the case for [Mr. A], that he felt extremely vulnerable and insecure and much more anxious as a result of having revealed that information.

Q: All right. But it's good thing to have him do that in therapy, isn't it?
A: Yes , it is, generally..
Q. Is there any reason why it wasn't a good idea here?
A: I don't have enough information to say one way or the other. The records would certainly indicate that it most likely was a positive, helpful thing.
Q: Can you tell us whether or not there is any indication that [Mr. A] became dependent on Dr. Bar-av?
A: The record would indicate that there were very frequent and long sessions, that [Mr. A] sought reassurance from Dr. Bar-av, and in that sense certainly he came to rely or depend upon him. That is not uncommon to have that happen in therapy, although when an individual reveals as much emotional material, it's not uncommon to become fairly dependent upon the therapist. (Tr. At 204).

Mr. A and Ms. B remained in therapy with Dr. Bar-Av after he left his office in Beaver Dam and relocated in Madison. Dr. Bar-Av counseled them both jointly and individually at his private residence. In 1994, Ms. B. moved to Madison, near Dr. Bar-Av's residence. Ms. B filed for divorce from Mr. in May of 1995, and continued receiving individual psychotherapy with Dr. Bar-Av until the end of 1995.
Although their therapeutic relationship ended in December of 1995, Dr. bar-Av and Ms. B occasionally met with one another to discuss a variety of things, including how Ms. B might find a support group for those going through a divorce and computer technology matters. Beginning in late June of 1996, Dr. Bar-Av lost his driving privileges as a result of a seizure. From June until September of 1996, Ms. B provided Dr. Bar-Av with transportation by driving him in her car.

During that time the two developed a personal relationship which continues to today. Initially, their relationship began with meetings in places such as a coffee shop or a bookstore where they would have friendly discussions. By April of 1998, their relationship had become sexually intimate.

While their post-therapy relationship was developing, Ms. B began giving Dr. Bar-Av various sums of money. For instance, in April of 1997, Ms. B gave Dr. Bar-Av $5000.00 to assist him with problems he was apparently having with the federal government and the payment of child support. She again gave Dr. bar-Av $2000 in February of 1998 to invest in a psychotherapy business that would be conducted over the telephone. (Tr. At 474-477; 479).

In addition to the money that Ms. B gave to Dr. Bar-Av, she also bought Dr. Bar-Av a computer and printer in August of 1997, totaling approximately $3700.00 (Tr. At 499-501). She also purchased a 1996 Volvo automobile for him to use. Ms B purchased the vehicle in 1999 for $23,000. Dr. Bar-Av had driven it ever since then. (Tr. At 491-496). Ms B also deposited at least seven checks that Dr. Bar-Av received from his family in Israel into her account, and then wrote checks to him for those amounts. (Tr. At 503).

At issue in this case is the post-therapeutic relationship that developed between Dr. Bar-Av and Ms. B and whether such a relationship was in violation of the professional code of conduct imposed on licensed psychologists. There is no dispute that such a relationship developed and that it continues to the

present day. However, the effect it had not only on Ms. B but also on Mr. A, must be considered.

By his own admission, Mr. A was devastated upon learning that Ms. B and his former therapist, Dr. Bar-Av, had entered in to an intimate relationship. As a result, in early July of 1998, he sought treatment from Nina Bartell, a practicing psychologist, for his resulting anxiety and depression. Dr. Bartell's clinical notes as well as her testimony indicate that Mr. A's symptoms had become exacerbated as a direct result of discovering that Ms. B and Dr. Bar-Av were engaged in a sexual relationship. (Tr. at 436-438).

What makes Mr. A's discovery about his former wife and Dr. Bar-Av all the more disturbing is the fact that Dr. Bar-Av , having extensively treated Mr. A over a period of several years, had to have known that his involvement with Ms. B would negatively impact Mr. A. It is inconceivable to imagine any other effect that such a discovery would have had. Indeed, Dr. Seaman agreed with the conclusion. According to Dr. Seaman's written report, the processes of therapy broke down Mr. A's rigid and emotionally distant defenses, which were most likely related to his history of physical and sexual abuse by his older brother. Through the therapeutic process, the report notes, Mr. A became dependent upon Dr. Bar-Av. In turn, Mr. A viewed Dr. Bar-Av as being quite powerful and threatening. In light of that, especially Mr. A's insecurity about "competitors" for his wife and his history of sexual dysfunction, Dr. Seaman concluded that "it is difficult to imagine a boundary violation which would have been more destructive than for Dr. Bar-Av to become involved with Ms. [B]." (Exhibit 11 at 5-6).

Because of the ensuing relationship that developed between Dr. Bar-Av and Ms .B, Dr. Seaman believed that Mr. A was harmed in several ways. First, it reinforced his inadequacy as a husband, both emotionally and sexually. Second, it replayed the abuse by his older brother, in a way that made him doubt his worth and masculinity. Third, when Mr. A raised concerns about a coalition existing between Ms. B and Dr. Bar-Av, it was treated as part of Mr. A's pathology. While ordinarily such an approach would be appropriate, their later involvement, that is, between Dr. Bar-Av and Ms. B, would make future therapy for Mr. A much more difficult as he would quite naturally doubt a future therapist's attempts to interpret his feelings as expressions of his own issues. Fourth, it impacted his ability to trust, which was already a difficult issue for him. Finally, it likely strengthened Mr. A's defensive style, which was part of an identified problem of his (Exhibit 11 at 6).

As Dr. Seaman points out, if Dr. Bar-Av was aware of these potential problems and proceeded with his relationship with Ms. B anyway, he was acting quite unprofessionally by disregarding the welfare of his former patient, Mr. A. On the other hand, if he was unaware of the possible problems that such a relationship would be likely to cause, it would demonstrate a lack of the most basic understanding of the therapy process so as to make him quite dangerous.

Section Psy 5.01 (2), Wis. Admin. Code, state that it is unprofessional conduct to commit gross negligence in the practice of psychology. Gross negligence is defined in s. Psy. 1.02 (6), Wis. Admin. Code, and means the "performance of professional services that do not

comply with an accepted standard of practice that has a significant relationship to the protection of the health, safety or welfare of patient or public, and that are performed in a manner indicating that the licensee knew or should have known, but acted with indifference to or disregard of , the accepted standard of practice." By engaging in a sexual relationship with Ms. B, after having treated not only her, but also Mr. A, her former husband, it is inconceivable that Dr. Bar-Av would not consider the possible consequences that such a relationship might have on Mr. A, not to mention on Ms. B. Moreover, the fact that he went ahead with the relationship anyway, in spite of all the problems that he knew Mr. A had, is unquestionably conduct that constitutes gross negligence.

Furthermore, s. Psy 5.01 (4), Wis. Admin. Code, states that it is unprofessional conduct to perform professional services inconsistent with training ,education, or experience. Dr. Seaman indicated that engaging in sexual relationship with a former patient's wife, as Dr. Bar-Av did, would certainly be another violation of the professional code of conduct in that such behavior would be inconsistent with the training, education, or experience of a licensed psychologist. Psychologists are trained and educated to maintain boundaries between themselves and their patients. By entering into a relationship with his. B, Dr. Bar-Av essentially disregarded any effect such a relationship might have on Mr. A. In doing so, he clearly failed to adhere to the boundaries that are inherent in the education and training one receives as a psychologist.

In addition to the adverse effect that Dr. Bar-Av's and Ms. B's relationship had on Mr. A, the effect it had on

Ms. B must also be examined. Section Psy 5.01 (17), Wis. Admin. Code, states that it is unprofessional conduct to fail to avoid dual relationships or relationships that may impair one's objectivity or create a conflict of interest. Section Psy. 5.01 (14)[1] of the Psychology Examining Board's administrative rules also prohibits sexual conduct with a former client, unless the psychologist can demonstrate that there as been no exploitation of the former client. The following factors must be considered in determining wither there was, in fact, exploitation:

(1) The length of time which had passed between the termination of professional services and the conduct.

(2) The nature and duration of the professional services.

(3) The circumstances of the termination

(4) The client's personal history.

(5) The client's mental status at the time of the conduct took place

(6) The likelihood of the adverse impact on the client or others.

(7) Statements or actions made by the licensee during the course of professional services suggesting or inviting the possibility of a post-termination sexual or romantic relationship with the client.

Dr. Seaman's report correctly notes that Dr. Bar-Av provided no information that would suggest that his relationship with Ms. B was one of those unusual

circumstances in which the therapeutic relationship had truly ended, and, after several years, a separate and independent personal relationship had developed. On the contrary, the record indicates that there was no clear ending of the therapeutic relationship and the independent development of a separate one. To be sure, Dr. Bar-Av and Ms. B met for coffee within several weeks following the last reported date of therapy to discuss her psychological needs, more specifically, what type of support group might be good for her. Within several months, Ms. B was driving Dr. Bar-Av to various places he needed to go. (exhibit 11 at 3).

Later, Ms. B began giving significant sums of money to Dr. Bar-Av of which little, if any, he has ever repaid. While testifying about giving Dr. Bar-Av $5000.00, Ms B became visibly upset. The $5000.000 that she gave to Dr. Bar-Av had come from Ms. B's mother. Dr. Bar-Av did not repay that money, and, in turn, Ms. B was not able to repay her mother prior to her death in March of 1999. It appeared that Ms. B had obvious misgivings about having loaned that particular sum of money to Dr. Bar-Av. The resulting rides, the purchase of an automobile, and the giving of money to Dr. Bar-Av were all a direct result of Dr. Bar-Av's needs, and not those of Ms. B's. As Dr. Seaman aptly summarized it, "This is typical of the development of their relationship, as an evolution of the therapy relationship into something more, with no clear boundaries, and the changes in the relationship often resulting from Dr. Bar-Av's needs, rather than Mr. B's." (exhibit 11 at 3). Thus, Dr. Bar-Av very plainly failed to avoid a dual relationship that was obviously rife with the potential for financial, legal, and psychological conflicts.

Dr. Bar-Av's sexual involvement with Ms. B is also disconcerning. While the code of conduct contemplates the possibility of therapists becoming involved with former clients, the burden is on the psychologists to demonstrate that such a relationship is appropriate. According to Dr. Seaman, the situations in which developing a sexual relationship after two years would be appropriate is certainly the exception, rather than the rule. However, Dr. Bar-Av was unable to provide any information that would suggest that he and Ms .B had genuinely ended their therapeutic relationship before developing a separate and independent personal one, or that he had given any consideration whatsoever to the elements in s. Psy 5.01 (14), Wis. Admin Code, before entering into a sexual relationship with Ms. B.

Dr. Bar-Av's primary defenses for becoming involved with Ms. B seem at odds with his professional obligations as a psychologist. His first defense to the allegation that he wrongly entered into a dual relationship with Ms. B is that he was in dire financial straits. Dr. Bar-Av was unequivocal in his position that if he was to again face the prospect of living on the street versus accepting the financial assistance of Ms. B in order to avoid such displacement, he would again choose her financial assistance. (Transcript at 808). His second defense is based upon the implication that Mr. A is a very troubled man and, because of that, the complaint he filed against Dr. Bar-Av should be discredited. Furthermore, instead of being viewed as a victimizer, Dr. Bar-Av implied that he (Dr. Bar-Av) should be viewed as a savior to Ms. B who lived with the abusive Mr. A for over twenty years. Dr. Bar-Av's defenses are not persuasive.

Knowing Mr. A as he did, it is incomprehensible that Dr. bar-Av even contemplated becoming involved with Ms. B, let alone, actually becoming involved with her. His conduct is clearly a violation of s. Psy. 5.01 (14), Wis. Admin Code, particularly when one factors in his extensive therapeutic relationships with both Mr. A and Ms. B, the power balance that existed between him and Ms. B, and the overwhelming evidence that his needs were being met versus Ms. B's. What consistently emerges throughout the relationship between Dr. Bar-Av and Ms. B is that whenever Dr. Bar-Av needed something, be it transportation, a computer, or money, Ms. B was always at the ready to provide it to him. In taking this approach to his needs, Dr. Bar-Av either failed to consider its effects or simply disregarded them. Whichever the case may be, it demonstrates Dr. Bar-Av's indifferences to his professional obligations as a psychologist.

The question remains, therefore, as to what the appropriate from of discipline is for Dr. bar-Av. An indefinite suspension of Dr. Bar-Av's license has been recommended. It is well established that the objectives of professional discipline include the following: (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct. State v. Aldrich, 71 Wis. 2d 206, 209 (1976). Punishment of the licensee is not an appropriate consideration. State v. MacIntyre, 41 Wis. 2d 481, 485 (1969).

Dr. Bar-Av seems to have little recognition or apparent concern that his conduct was not in keeping with the standards of his profession. His lack of insight is especially troubling given how much experience he has

as a practicing psychologist. It is for these reasons that a period of suspension is being recommended. Additionally, it is imperative that he be evaluated by a psychologist of the Board's choosing so that a determination can be made as to whether Dr. bar-Av is in need of therapy, whether he needs further education, whether he needs a period of supervision if permitted to practice, and what an appropriate practice setting is for him. These measures are essential in order to rehabilitate Dr. Br-Av, to ensure that the public is adequately safeguarded, and to prevent other licenses from engaging in conduct of this nature.

In addition, the imposition of costs against Dr. Bar-Av is recommended. Section 440.22(2), Stats., provides in relevant part as follows:

In any disciplinary proceeding against a holder of a credential in which the department or and examining board, affiliated credentialing board of board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board of board may, in addition in imposing discipline, assess all or part of the costs of the proceedings against the holder. Costs assess under this subsection are payable to the department.

The presence of the word "may" in the statute is a clear indication that the decision whether to assess the costs of this disciplinary proceeding against a respondent is a discretionary decision on the part of the Psychology Examining Board, and that the Board's discretion extends to the decision whether to assess the full costs or only a portion of the costs . The recommendation that

the full costs of the proceeding be assessed is based primarily on fairness to other members of the profession.

The Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Moreover, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions and are proportionate to those costs. This budge structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engage in misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following a full evidentiary hearing that licensee should bear the costs of the proceeding.

Footnote

[1]

1. Section Psy 5.01 (14), Wis. Admin. Code, provides: Engaging in sexual contact, sexual conduct, or any other behavior which could reasonably be construed as seductive, with:
(a) A client.
(b) A former client within 2 years of termination of professional services.
(c) A former client beyond 2 years of termination of professional services, unless the licensee can demonstrate that there has been no exploitation

of the former client, in light of all relevant factors, including:

1. The length of time which had passed between the termination of professional services and the conduct.
2. The nature and duration of the professional services.
3. The circumstances of the termination.
4. The client's personal history.
5. The client's mental status at the time the conduct took place.
6. The likelihood of the adverse impact on the client or others.
7. Statements or actions made by the licensee during the course of professional services suggesting or inviting the possibility of a post-termination sexual or romantic relationship with the client.

STATE OF WISCONSIN BEFORE THE PSYCHOLOGY EXAMINING BOARD

IN THE MATTER OF ZEEV BAR-AV, PH.D., CREDENTIAL HOLDER.

AGREEMENT REGARDING EVALUATION

It is hereby stipulated and agreed, by and between Zeev Bar-Av, PhD., (Credential Holder); Jordan C. Loeb of Cullen, Weston, Pines & Bach, attorneys for Credential Holder; and John R. Zwieg of the Wisconsin Department of Regulation and Licensing, Division of Enforcement (DOE), as follows.

1. That DOE has a pending investigation of Credential Holder on behalf of the Psychology Examining Board.

2. That Credential Holder is licensed to practice psychology in the state of Wisconsin by the Psychology Examining Board.

3. That Credential Holder and DOE believe that a psychological evaluation of Credential Holder will be useful in determining how to proceed with the pending investigation.

4. That DOE has recommended to Credential Holder that Credential Holder be evaluated by John C. Gonsiorek, Ph.D. (Evaluator), a psychologist who practices in Minneapolis, Minnesota.

5. That Credential Holder has agreed to be evaluated by Evaluator at Credential Holder's expense.

6. That Credential Holder understands that although the evaluation is taking place at Credential Holder's expense. Evaluator is not entering into a therapist-client relationship with Credential Holder, nor is Evaluator in any way employed by or an agent of Credential Holder. Credential Holder understands that Evaluator may make findings or conclusions. adverse to Credential Holder.

7. That Credential Holder authorizes Evaluator to release to DOE: all records and information produced or obtained in the course of the evaluation; and, any testing, test results or reports produced in the course of, or as a result of, the evaluation. Credential Holder further authorizes Evaluator to discuss the evaluation and Evaluators conclusions with DOE.

8. That if the parties are unable to reach a stipulated resolution of the pending proceeding and the matter goes to hearing in the formal disciplinary process, DOE agrees not to introduce as evidence at the hearing any information DOE receives from Evaluator as a result of this agreed upon evaluation for the purpose of proving that Credential Holder has engaged in the conduct alleged in the investigative file which would be a violation of a statute or rule which would subject Credential Holder to discipline.

9. That if the parties are unable to reach a stipulated resolution of the pending investigation and the matter goes to the formal disciplinary process, DOE

may use any information received from Evaluator as a result of this agreed upon evaluation, for the following purposes;

a. To impeach Credential Holder's testimony;

b. To rebut other evaluations or opinions Credential Holder may introduce;

c. To establish what appropriate discipline should be imposed, if it is determined that Credential Holder is subject to discipline based on the allegations in the investigative file; and,

d. To prove that Credential Holder suffers from a condition which makes Credential Holder unable to practice the licensed profession with reasonable skill and safety to the public, if the evaluation indicates the existence of such a condition.

10. Other than as set out in paragraphs 7, 8 and 9 above, it is the intent of the parties that the psychological evaluation and information provided by Evaluator to DOE shall remain confidential to the extent allowed under §§ 51.30 and 146.82, Stats., and the exceptions to the public records and open meetings laws.

Zeev Bar-Av, Ph.D.
Credential Holder

Jordan C. Loeb
Cullen, Weston, Pines & Bach Attorneys for Credential Holder

John R. Zwieg
Presecuting Attorney